Indrani a/p Ramasamy v Kesavan a/l Subramaniam

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1244–07 OF 2022
KAMALUDIN MD SAID, HASHIM HAMZAH AND COLLIN SEQUERAH JJCA
30 NOVEMBER 2023

Tort — Defamation — Libel and slander — Defendant submitted 'no case to answer' after plaintiff had closed her case — Whether all evidence adduced by plaintiff had to be assumed to be true — Whether plaintiff had proved her case — Whether absent rebuttal evidence from defendant, trial court erred in not granting judgment to plaintiff — Whether trial court's dismissal of suit based on matters not pleaded or canvassed by either party was blatantly perverse

The appellant had sued the respondent for defamation in the High Court. At the material time, the respondent was a Member of Parliament. The appellant claimed that the respondent made several defamatory remarks about her to media personnel during a press conference and repeated the remarks on his Facebook page and that by reason of those publications she suffered public scandal, odium and contempt and considerable embarrassment, distress and hurt feelings. The appellant sought general, aggravated and exemplary damages from the respondent and an injunction to restrain him from further publishing the words complained of. The respondent relied upon the defence of justification, contending that whatever he had said of the appellant were substantially true. At the close of the appellant's case at trial, the respondent submitted that he had no case to answer. The High Court dismissed the appellant's suit and ordered both parties to bear their own costs after finding that both the appellant's claim and the respondent's defence were a sham and a deception upon the court such that the court would not lend its aid to either party. In the instant appeal against the decision, the appellant argued that the trial court's verdict was perverse for not considering the fact that the respondent had not adduced any evidence to contradict her case. She said the trial judge had totally departed from the pleadings of the parties and had gone on a frolic of her own to find that the appellant and respondent were engaged in a sordid, immoral and inappropriate extramarital affair that the court could never countenance' and dismissed the suit on the grounds of public policy and morality without giving an opportunity to the parties to address the court on those grounds.

Held, allowing the appeal and awarding the appellant a global sum of RM80,000 in general and aggravated damages with interest and costs:

(1) The trial judge had failed to consider whether the appellant had made out a cause of action in defamation in the light of the respondent's submission that he had no case to answer. Instead, the judge had wrongly found that both parties had exhibited immoral and dishonourable conduct and dismissed the appellant's claim. The decision was clearly wrong and had to be set aside (see paras 22–23).

(2) The trial judge misdirected herself on the principle of law to be applied when the evidence only came from the plaintiff (the appellant). Since the respondent had offered no evidence at all during the trial, the trial court's duty was to examine the appellant's claim and the evidence led by her to determine whether all of the appellant's evidence must be assumed to be true, whether the evidence, at face value, had established a case in law or whether the evidence for the appellant was so unsatisfactory or unreliable that the court should find that she had not discharged her burden of proof. Judgment should have been granted to the appellant if she had succeeded in proving her case (see paras 19–20).

(3) On the facts and evidence, all elements necessary to establish the cause of action in defamation had been satisfied by the appellant. The evidence adduced by her stood unrebutted by virtue of the respondent's submission of 'no case to answer'. The appellant's claim should have been allowed. The trial judge erred when she failed to decide the case in the appellant's favour and had instead dismissed the suit based on matters not canvassed by either party (see paras 38–39).

(4) The court took into account the appellant's submissions that the allegations made by the respondent were grave and touched on the appellant's integrity, reputation and honour and the core attributes of her personality. The defamation was published twice over the internet, on StarTV.com and on Facebook. Hence, the size and influence of the circulation was massive and untold. And as the impugned publications were made by an MP, the words complained of would have carried far more weight than if they had come from an ordinary person. The appellant had sought a total sum of RM400,000 by way of general damages and RM100,000 as aggravated damages. However, based on case-law and considering the circumstances of the case, the court was of the view that it was fair and reasonable to award the appellant general and aggravated damages in a global sum of RM80,000 (see paras 44, 47 & 49).

[Bahasa Malaysia summary

Perayu telah menyaman responden atas fitnah di Mahkamah Tinggi. Pada masa material, responden adalah seorang Ahli Parlimen. Perayu mendakwa bahawa responden telah membuat beberapa kenyataan berunsur fitnah mengenainya kepada petugas media semasa sidang akhbar dan mengulangi

kenyataan itu di laman Facebooknya dan bahawa atas sebab penerbitan itu dia mengalami skandal awam, odium dan penghinaan serta rasa malu, tertekan dan perasaan. Perayu meminta ganti rugi am, teruk dan teladan daripada responden dan injunksi untuk menghalangnya daripada terus menerbitkan perkataan yang diadukan. Responden bergantung kepada pembelaan justifikasi, berpendapat bahawa apa sahaja yang dia katakan tentang perayu adalah sebahagian besarnya benar. Pada penutupan kes perayu semasa perbicaraan, responden berhujah bahawa dia tidak mempunyai kes untuk dijawab. Mahkamah Tinggi menolak saman perayu dan memerintahkan kedua-dua pihak menanggung kos mereka sendiri selepas mendapati kedua-dua tuntutan perayu dan pembelaan responden adalah palsu dan penipuan ke atas mahkamah oleh sebab itu mahkamah tidak akan memberi bantuan kepada mana-mana pihak. Dalam rayuan semasa terhadap keputusan itu, perayu berhujah bahawa keputusan mahkamah perbicaraan adalah salah kerana tidak mengambil kira fakta bahawa responden tidak mengemukakan sebarang keterangan untuk menyanggah dengan kesnya. Beliau berkata hakim perbicaraan telah benar-benar menyimpang daripada pliding pihak-pihak dan telah membuat kesimpulan sendiri untuk mendapati perayu dan responden terlibat dalam hubungan luar nikah yang keji, tidak bermoral dan tidak sesuai yang mahkamah tidak boleh hadapi' dan menolak saman itu atas alasan dasar awam dan moral tanpa memberi peluang kepada pihak-pihak untuk menangani mahkamah atas alasan tersebut.

Diputuskan, membenarkan rayuan dan menganugerahkan perayu sejumlah global RM80,000 secara am dan ganti rugi teruk dengan faedah dan kos:

(1) Hakim bicara telah gagal untuk mempertimbangkan sama ada perayu telah mengemukakan kausa tindakan fitnah memandangkan penghujahan responden bahawa dia tidak mempunyai kes untuk dijawab. Sebaliknya, hakim telah tersilap mendapati bahawa kedua-dua pihak telah menunjukkan kelakuan tidak bermoral dan tidak bermaruah dan menolak tuntutan perayu. Keputusan itu jelas salah dan terpaksa diketepikan (lihat perenggan 22–23).

(2) Hakim bicara salah mengarahkan dirinya pada prinsip undang-undang untuk digunakan apabila keterangan hanya datang daripada plaintif (perayu). Memandangkan responden tidak memberikan keterangan sama sekali semasa perbicaraan, kewajipan mahkamah perbicaraan adalah untuk memeriksa tuntutan perayu dan keterangan yang dibawa olehnya untuk menentukan sama ada semua keterangan perayu mesti diandaikan sebagai benar, sama ada keterangan itu, secara dasar, telah membuktikan kes dalam undang-undang atau sama ada keterangan untuk perayu adalah sangat tidak memuaskan atau tidak boleh dipercayai sehingga mahkamah sepatutnya mendapati bahawa dia tidak melepaskan beban pembuktiannya. Penghakiman sepatutnya diberikan kepada

perayu jika dia telah berjaya membuktikan kesnya (lihat perenggan 19–20).

(3) Mengenai fakta dan keterangan, semua elemen yang perlu untuk membuktikan kausa tindakan fitnah telah dibuktikan oleh perayu. Keterangan yang dikemukakan olehnya tidak dapat disangkal berdasarkan penghujahan responden 'tiada kes untuk dijawab'. Tuntutan perayu sepatutnya dibenarkan. Hakim bicara tersilap apabila dia gagal memutuskan kes yang memihak kepada perayu dan sebaliknya menolak saman itu berdasarkan perkara yang tidak dibincangkan oleh mana-mana pihak (lihat perenggan 38–39).

(4) Mahkamah mengambil kira hujahan perayu bahawa dakwaan yang dibuat oleh responden adalah berat dan menyentuh integriti, reputasi dan kehormatan perayu serta ciri-ciri teras keperibadiannya. Fitnah itu diterbitkan dua kali melalui internet, di StarTV.com dan di Facebook. Oleh itu, saiz dan pengaruh peredaran adalah besar dan tidak terperi. Dan memandangkan penerbitan yang disangkal itu dibuat oleh seorang ahli parlimen, kata-kata yang diadukan akan membawa lebih berat daripada jika ia datang dari orang biasa. Perayu telah meminta sejumlah RM400,000 sebagai ganti rugi am dan RM100,000 sebagai ganti rugi teruk. Walau bagaimanapun, berdasarkan undang-undang kes dan mempertimbangkan keadaan kes, mahkamah berpendapat adalah adil dan munasabah untuk memberikan perayu ganti rugi am dan teruk dalam jumlah global RM80,000 (lihat perenggan 44, 47 & 49).]

Cases referred to

Atip bin Ali v Josephine Doris Nunis & Anor [1987] 1 MLJ 82; [1986] CLJ Rep 283 (refd)

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152; [1989] 1 CLJ Rep 321, HC (refd)

Cheong Chark v Gammon (Malaya) Ltd [1939] 1 MLJ 65 (refd)

Dato' Ahmad Sudin v Data' Ariffin Man [2016] 1 LNS 136, HC (refd)

Dato' Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin [2011] 8 MLJ 608, HC (refd)

Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492, HC (refd)

Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal & Ors [2009] 7 MLJ 371; [2009] 2 CLJ 682, HC (refd)

Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat [2012] 2 MLJ 807, HC (refd)

Hj Saari bin Sungib v Pemegang Amanah Lembaga Zakat Selangor (MAIS), Berdaftar & Anor [2016] 2 MLJ 830; [2016] 5 CLJ 40, CA (refd)

Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor [2007] MLJU 894; [2008] 2 CLJ 814, HC (refd)

Jahara Hamid lwn Lim Guan Eng [2015] MLJU 2358; [2015] 6 CLJ 328, HC (refd)
Kesatuan Kebangsaan Pekerja-Pekerja Bank & Ors v The New Straits Times Press (M) Bhd & Ors and another suit [2013] 8 MLJ 199, HC (refd)
Knupffer v London Express Newspaper Ltd [1944] AC 116, HC (refd)
Kumarasamy a/l Naciappan v The New Straits Times Press (M) Bhd [2013] 7 MLJ 361; [2012] 1 LNS 997, HC (refd)
Lim Guan Eng lwn Utusan Melayu (M) Bhd [2013] 8 MLJ 575; [2012] 2 CLJ 619, HC (refd)
Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369, CA (refd)
Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553, FC (refd)
Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] 2 CLJ 1037, FC (refd)
Tan Sri Dato' Lim Guan Teik v Tan Kai Hee [2014] 9 MLJ 363; [2013] 10 CLJ 771, HC (refd)
Wong Yoke Kong & Ors v Azmi M Anshar & Ors [2003] 4 MLJ 96, HC (refd)
YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor [2012] 7 MLJ 301; [2011] 1 LNS 1161, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(1)

Appeal from: *Indrani a/p Ramasamy v Kesavan a/l Subramaniam* [2022] MLJU 1508 (High Court, Kuala Lumpur)

Rueben Mathiavaranam (with Sumita Balasubramaniam) (Zaid Ibrahim Suflan TH Liew & Partners) for the appellant.
Azhar bin Arman Ali (with Aina Syazwani) (A Arman & Co) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] This is the appellant's appeal against the decision of the High Court in dismissing the appellant's claim for defamation against the respondent on 29 June 2022 delivered after a full trial. The High Court also ordered that parties bear their own costs.

[2] At the High Court the appellant, Indrani a/p Ramasamy is the plaintiff married with two children and at all material times was the treasurer of Parti Keadilan Rakyat, Sungai Siput branch. The respondent, Kesavan a/l Subramaniam is the defendant and at all material times, was the Member of Parliament for Sungai Siput from Parti Keadilan Rakyat.

[3] At a press conference called for by the defendant on 18 May 2019, the defendant spoke and published his press statement to persons representing the various media organisations comprising reporters, photographers, cameramen ('members of the press') and/or in the presence and hearing of all persons present.

[4] The press statements were recorded and broadcast by the media on 18 May 2019 over StarTV.com and also posted on the defendant's Facebook page. The impugned publications are both annexed as 'Lampiran A' and 'Lampiran B' in the statement of claim as follows:

Lampiran A

Speaker

YB Kesavan Subramaniam

Transcript

START

Sejahtera dan selamat tengah hari, bersama saya YB Sivanesan EXCO Kerajaan Negeri Perak, dan semua wartawan yang saya hormati sekalian. Pada tengah hari ini saya buat satu kenyataan media berkenaan dengan satu laporan polis yang telah dibuat oleh seorang wanita terhadap saya. Ini adalah kenyataan media saya. Sedia maklum, satu laporan polis berniat jahat yang telah dibuat terhadap saya oleh seorang wanita yang mengaku sebagai pegawai penyelidik Parlimen saya. Pertama kali saya dihubungi oleh wanita tersebut ialah sekitar tahun 2017 semasa saya mengendalikan kempen membantah pemindahan pengundi-pengundi hantu ke kawasan Dewan Undangan Negeri Hutan Melintang. Pada ketika itu saya adalah ADUN Hutan Melintang. Saya dihubungi oleh wanita ini yang pada ketika itu memaklumkan mahu membantu kempen saya menghalang pemindahan pengundi hantu ke kawasan DUN Hutan Melintang. Dia mengaku dia seorang peguam yang boleh membantu saya dan memaklumkan dia juga rapat dengan Datuk V. Elango, Pengerusi MIC Perak, yang pada ketika itu dan kini turut mahu bertanding di DUN Hutan Melintang. Saya menerima tawaran bantuan itu dengan terbuka kerana dia mahu menjadi sukarelawan yang mahu membantu kempen saya, seperti juga ramai sukarelawan parti yang lain. Sekitar kempen PRU 14, ada rakaman audio yang melibatkan wanita ini dan Datuk V. Elango yang disebar melalui WhatsApp. Wanita ini membuat beberapa tuduhan terhadap Datuk V. Elango melalui rakaman audio itu. Selepas saya menjadi Ahli Parlimen Sungai Siput, dia menyatakan hasrat ingin membantu saya secara sukarelawan walaupun dia sudah mempunyai keluarga dengan dua orang anak dan tinggal di Puchong. Ketika itu, dia berkelakuan seperti kawan kepada saya dan isteri saya. Dia selalu menelefon saya dan isteri saya. Pernah juga dia menjemput saya dan isteri untuk bercuti bersamanya di Melaka. Lama-kelamaan, kekerapan dia menelefon saya semakin bertambah sehingga berpuluh kali sehari. Jika saya tidak menjawab, dia mula marah. Apabila saya menjawab, ada kalanya perbualan melebihi lebih satu jam setiap kali. Juga mula campur tangan dalam hal rumah tangga saya. Dia pernah menyebarkan berita di kalangan rakan sekerja isteri saya yang memburuk-burukkan isteri saya. Seolah-olah dia mahu perkahwinan kami bermasalah. Menjelang September 2018,

saya mula menjadi kurang selesa dengan kelakuan wanita ini yang mula berubah dari seorang yang mengaku mahu menjadi kawan kepada seorang yang mula mempunyai perasaan terhadap saya. Keadaan menjadi lebih rumit apabila dia mula campur tangan dengan perjalanan pusat khidmat saya di Sungai Siput. Dia mahu saya memecat pembantu tertentu, dan marah apabila saya enggan memecat. Sejak beberapa bulan lalu, dia mula mengaku bahawa dia pembantu khas saya. Dia menelefon pengawai-pegawai Kerajaan termasuk Penolong Pegawai Daerah dan memberi arahan bagi pihak saya yang tidak disenangi oleh pegawai-pegawai Kerajaan. Dia juga mendesak supaya diberikan pas untuk mengikuti saya ke Persidangan Parlimen. Saya memberikan surat kepada Pentadbir Keselamatan Parlimen untuk membenarkan dia masuk ke kawasan Parlimen. Surat itu digunakan untuk mengaku yang dia sudah dilantik sebagai pegawai pembantu saya. Sejak sebulan setengah lalu, dia mula menelefon berpuluh-puluh kali setiap hari. Dia juga mula mengganggu pimpinan PKR yang lain seperti saudara Rafizi Ramli, Naib Presiden PKR, untuk mengadu mengenai sikap saya yang menjauhkan diri. Dia juga mengugut untuk mendedahkan rakaman yang dia kata akan memalukan saya. Dia juga pernah mengucapkan agar saya 'pergi mati'. Saya menjadi tertekan dengan ugutan-ugutan ini kerana saya pernah lihat bagaimana dia menyerang Datuk V. Elango setahun yang lepas melalui rakaman audio percakapannya. Saya berbincang dengan saudara Rafizi Ramli dan beliau menasihati saya untuk membuat satu laporan polis, dan saya telah membuat laporan polis pada 4 May 2019 mengenai gangguan dan tekanan dari wanita ini. Perkara ini masih disiasat. Saya dan isteri juga telah membuat rakaman gangguan beliau termasuk mesej-mesej berbentuk peribadi yang menunjukkan beliau mahu rumah tangga saya retak. Jika benar saya mengganggu dia secara seksual seperti yang dituduh, kenapa dia masih menelefon saya sehingga berpuluh-puluh kali sehingga awal bulan ini? Dia juga masih menelefon isteri saya sehinggakan sehinggalah beberapa minggu lalu. Saya tidak mahu membesarkan perkara ini sebelum ini kerana saya simpati kepada dia yang sudah mempunyai suami dan dua orang anak. Saya akan memberi keterangan kepada pihak berkuasa dan memberi kerjasama penuh dalam siasatan yang bakal dijalankan, termasuklah menyerahkan bukti-bukti yang menunjukkan gangguan dan ugutan yang dibuat untuk merosakkan rumah tangga saya. Saya juga telah menyerahkan perkara ini kepada peguam-peguam intuk ambil tindakan undang-undang yang selanjutnya untuk membersihkan nama saya dan isteri saya. Saya bahagia dengan isteri saya dan tidak berhasrat untuk terjebak dengan sebarang perhubungan yang boleh menjejaskan rumah tangga saya. Berdepan dengan fitnah dan tuduhan demi mempertahankan kebahagiaan rumah tangga kami.

Duration : 00:06:51

END

Lampiran B

Kesavan Subramanian

18 May

KENYATAAN MEDIA AHLI PARLIMEN SUNGAI SIPUT YB KESAVAN SUBRAMANIAM

1. Saya sedia maklum satu laporan polis berniat jahat yang telah dibuat terhadap saya oleh seorang wanita yang mengaku sebagai pegawai penyelidik Parlimen saya.

2. Pertama kali saya dihubungi oleh wanita tersebut ialah sekitar tahun 2017 semasa saya mengendalikan kempen membantah pemindahan pengundi-pengundi hantu ke kawasan Dewan Undangan Negeri Hutan Melintang.

3. Saya dihubungi oleh wanita ini yang pada ketika itu memaklumkan mahu membantu kempen saya menghalang pemindahan pengundi hantu ke kawasan DUN Hutan Melintang. Dia mengaku dia seorang peguam yang boleh membantu saya dan memaklumkan dia juga rapat dengan Datuk V. Elango, Pengerusi MIC Perak, yang pada ketika itu dan kini turut mahu bertanding di DUN Hutan Melintang.

4. Saya menerima tawaran bantuan itu dengan terbuka kerana dia mahu menjadi sukarelawan yang mahu membantu kempen saya, seperti juga ramai sukarelawan parti yang lain.

5. Sekitar kempen PRU 14, ada rakaman audio yang melibatkan wanita ini dan Datuk V. Elango yang disebar melalui WhatsApp. Wanita ini membuat beberapa tuduhan terhadap Datuk V. Elango melalui rakaman audio itu.

6. Selepas saya menjadi Ahli Parlimen Sungai Siput, dia menyatakan hasrat ingin membantu saya secara sukarelawan walaupun dia sudah mempunyai keluarga (dengan dua orang anak) dan tinggal di Puchong.

7. Ketika itu, dia berkelakuan seperti kawan kepada saya dan isteri saya. Dia selalu menelefon saya dan isteri saya. Pernah juga dia menjemput saya dan isteri untuk bercuti bersamanya di Melaka.

8. Lama-kelamaan, kekerapan dia menelefon saya semakin bertambah sehingga berpuluh kali sehari. Jika saya tidak menjawab, dia mula marah. Apabila saya menjawab, ada kalanya perbualan melebihi lebih satu jam setiap kali.

9. Dia juga mula campur tangan dalam hal rumah tangga saya. Dia pernah menyebarkan berita di kalangan rakan sekerja isteri saya yang memburuk-burukkan isteri saya. Seolah-olah dia mahu perkahwinan kami bermasalah.

10. Menjelang September 2018, saya mula menjadi kurang selesa dengan kelakuan wanita ini yang mula berubah dari seoragn yang mengaku mahu menjadi kawan kepada seorang yang mula mempunyai perasaan terhadap saya.

11. Keadaan menjadi lebih rumit apabila dia mula campur tangan dengan perjalanan pusat khidmad saya di Sungai Siput. Dia mahu saya memecat pembantu tertentu, dan marah apabila saya enggan memecat.

12. Sejak beberapa bulan lalu, dia mula mengaku bahawa dia pembantu khas saya. Dia menelefon pengawai-pegawai Kerajaan termasuk Penolong Pegawai Daerah dan memberi arahan bagi pihak saya yang tidak disenangi oleh pegawai- pegawai Kerajaan.

13. Dia juga mendesak supaya diberikan pas untuk mengikuti saya ke Persidangan Parlimen. Saya memberikan surat kepada Pentadbir Keselamatan Parlimen untuk membenarkan dia masuk ke kawasan Parlimen. Surat itu digunakan untuk mengaku yang dia sudah dilantik sebagai pegawai pembantu saya.

14. Sejak sebulan setengah lalu, dia mula menelefon berpuluh-puluh kali setiap hari. Dia juga mula mengganggu pimpinan PKR yang lain seperti saudara Rafizi Ramli (Naib Presiden PKR) untuk mengadu mengenai sikap saya yang menjauhkan diri.

15. Dia juga mengugut untuk mendedahkan rakaman yang dia kata akan memalukan saya. Dia juga pernah mengucapkan agar saya 'pergi mati'.

16. Saya menjadi tertekan dengan ugutan-ugutan ini kerana saya pernah lihat bagaimana dia menyerang Datuk V. Elango setahun yang lepas melalui rakaman audio percakapannya.

17. Saya berbincang dengan saudara Rafizi Ramli dan beliau menasihati saya untuk membuat satu laporan polis. Saya telah membuat laporan polis pada awal bulan Mei 2019 mengenai gangguan dan tekanan dari wanita ini.

18. Perkara ini masih disiasat.

19. Saya dan isteri juga telah membuat rakaman gangguan beliau termasuk mesej-mesej berbentuk peribadi yang menunjukkan beliau mahu rumah tangga saya retak.

20. Jika benar saya mengganggu dia secara seksual seperti yang dituduh, kenapa dia masih menelefon saya sehingga berpuluh- puluh kali sehingga awal bulan ini? Dia juga masih menelefon isteri saya sehinggakan sehinggalah beberapa minggu lalu.

21. Saya tidak mahu membesarkan perkara ini sebelum ini kerana saya simpati kepada dia yang sudah mempunyai suami dan dua orang anak.

22. Saya akan memberi keterangan kepada pihak berkuasa dan memberi kerjasama penuh dalam siasatan yang bakal dijalankan, termasuklah menyerahkan bukti-bukti yang menunjukkan gangguan dan ugutan yang dibuat untuk merosakkan rumah tangga saya.

23. Saya juga telah menyerahkan perkara ini kepada peguam-peguam untuk ambil tindakan undang-undang yang selanjutnya untuk membersihkan nama saya dan isteri saya.

24. Saya bahagia dengan isteri saya dan tidak berhasrat untuk terjebak dengan sebarang perhubungan yang boleh menjejaskan rumah tangga saya.

25. Saya sanggup berdepan dengan fitnah dan tuduhan demi mempertahankan kebahagiaan rumah tangga kami.

Kesavan Subramanian

18 Mei 2019

[5] The defendant's press statements or media statements, contained amongst others, the words complained of set out under para 5 of the statement of claim as follows:

(a) Saya sedia maklum satu laporan polis berniat jahat yang telah dibuat terhadap saya oleh seorang wanita yang mengaku sebagai pegawai penyelidik parlimen saya. (I am aware that a malicious police report has been made against me by a woman who claims to be my parliamentary research officer).

(b) Selepas saya menjadi Ahli Parlimen Sungai Siput, dia menyatakan hasrat ingin membantu saya secara sukarela, walaupun dia sudah mempunyai keluarga (dengan dua orang anak) dan tinggal di Puchong. (After I had become the Member of Parliament for Sungai Siput, she made known her desire to assist me voluntarily, even though she already had a family (with two children) and was living in Puchong).

(c) Pada ketika itu, dia berkelakuan seperti kawan kepada saya dan isteri saya. Dia selalu menelefon saya dan isteri saya. Pernah juga dia menjemput saya dan isteri untuk bercuti bersamanya di Melaka. (At that point in time, her behavior was one as if she was a friend toward me and my wife. She always telephoned me and my wife. She had even invited me and my wife to go on holiday with her to Melaka).

(d) Lama-kelamaan, kekerapan dia menelefon saya semakin bertambah sehingga berpuluh kali sehari. Jika saya tidak menjawab, dia mula marah. Apabila saya menjawab, ada kalanya perbualan melebihi lebih satu jam setiap kali. (As time went on, the frequency in which she telephoned me increased to tens of times daily. If I did not answer, she would start to get angry. When I answered, at times the conversation would be in excess of one hour on every occasion).

(e) Dia juga mula campur tangan dalam hal rumah tangga saya. Dia pernah menyebarkan berita di kalangan rakan sekerja isteri saya yang memburuk-burukkan isteri saya, seolah-olah dia mahu perkahwinan kami bermasalah. (She also started to interfere in my household affairs. She had spread stories amongst my wife's colleagues which tarnished my wife, as if she wanted our marriage to have problems).

(f) Menjelang September 2018, saya mula menjadi kurang selesa dengan kelakuan wanita ini yang mula berubah dari seorang yang mengaku mahu menjadi kawan, kepada seorang yang mula mempunyai perasaan terhadap saya. (Around September 2018, I became uncomfortable with the behaviour of the woman which changed from one where she claimed to wanting to be a friend, to one in which she started having feelings for me).

(g) Sejak beberapa bulan lalu, dia mula mengaku bahawa dia pembantu khas saya. Dia menelefon pegawai-pegawai kerajaan (termasuk Penolong Pegawai Daerah) dan memberi arahan bagi pihak saya, yang tidak disenangi pegawai-pegawai kerajaan. (Ever since a new months ago, she started claiming to be my special aide. She telephoned government officers (including the Assistant District Officer) and gave instructions on my behalf, which caused uneasiness amongst the government officers).

(h) Dia juga mendesak supaya diberikan pas untuk mengikut saya ke persidangan Parlimen. Saya memberikan surat kepada pentadbiran keselamatan Parlimen untuk membenarkan dia masuk ke kawasan Parlimen. Surat itu digunakan untuk mengaku yang dia sudah dilantik sebagai pegawai pembantu saya. (She also demanded a pass to follow me to Parliamentary sessions. I gave a letter to the Parliament's security administration to enable her to enter the Parliament area. That letter was used to claim that she had been appointed as my assistant officer).

(i) Sejak sebulan setengah lalu, dia mula menelefon berpuluh-puluh kali setiap hari. Dia juga mula mengganggu pimpinan PKR yang Iain sepedi Saudara Rafizi Ramli (Naib Presiden PKR) untuk mengadu megenai sikap saya yang menjauhkan diri. (Ever since a month and a half ago, she started telephoning me tens of times daily. She also started disturbing other PKR leaders like Rafizi Ramli (PKR Vice President) to complain about my attitude of distancing myself from her).

(j) Saya berbincang dengan Saudara Rafizi Ramli dan beliau menasihati saya untuk membuat satu laporan polis. Saya telah membuat laporan polis pada awal bulan Mei 2019 mengenai gangguan dan tekanan dari wanita ini. (I discussed with Rafizi Ramli and he advised me to lodge a police report. I lodged the police report in early May 2019 about file harassment and pressure from the woman).

(k) Saya dan isteri juga telah membuat rakaman gangguan dari dia, termasuk mesej-mesej berbentuk peribadi yang menunjukkan dia mahu rumah tangga saya retak. (I and my wife had also made recordings of her harassment, including personal messages which showed that she wanted my household destroyed).

(l) Jika benar saya mengganggu dia secara seksual seperti yang dituduh, kenapa dia masih menelefon saya sehingga berpuluh-puluh kali sehingga awal bulan ini? Dia juga masih menelefon isteri saya sehingga beberapa minggu lalu. (If it was true that I had harassed her sexually as alleged, why is it that she still telephoned me up to tens of times until early this month? She even telephoned my wife until a lets months ago).

(m) Saya akan memberi keterangan kepada pihak berkuasa dan memberi kerjasama penuh dalam siasatan yang bakal dijalankan, termasuklah menyerahkan bukti-bukti yang menunjukkan gangguan dan ugutan yang dibuat untuk merosakkan rumah tangga saya); dan (I will provide the evidence to the authorities and fully cooperate in the forthcoming

investigations to 6e conducted, including handing over proof showing the harassment and threats made in order to destroy my household); and

(n) Saya juga telah menyerahkan perkara ini kepada peguam- peguam untuk diambil tindakan undang-undang yang selanjutnya, untuk membersihkan nama saya dan isteri saya'. (I have also handed over this matter to lawyers to commence further legal action, in order to clear my name and that of my wife's).

[6] At para 10 of the statement of claim, the plaintiff alleged that the words complained of in their ordinary meaning meant or were understood to mean or are capable of being understood to mean that she is a person of adverse character described under sub-para 10(a) to (p).

[7] The plaintiff alleged that she has been defamed by the words complained of in both media publications and by reason of the publications she has been brought into public scandal, odium and contempt. The plaintiff has also been injured in her feelings and has suffered considerable embarrassment and distress. Therefore the plaintiff seeks damages including aggravated damages and exemplary damages against the defendant and also injunction to restrain the defendant from further publishing the said words complained of.

[8] The defendant in para 3 of his statement of defense admitted publishing the press statements on 18 May 2019 however, did not admit that the press statements contain defamatory words against the plaintiff. At para 21 of statement of defense, the defendant pleaded that the press statements which were published are substantially true facts. The defendant pleads justification as his defense in the defamation action by the plaintiff.

[9] Upon completion of the full trial, the learned High Court judge ('the learned judge') dismissed the plaintiff's claim with both parties ordered to bear their own costs.

THE HIGH COURT DECISION

[10] The court decision after the full trial is stated as follows:

> [76] In view of the parties' disingenuous and deceptive attitude before this court, and the undeniable truth and fact of the parties sordid, immoral, and inappropriate extramarital affair, this court can never countenance such immoral behaviors to muddy the walls and floor of this court. The parties shall not find any aid from this court to be their instrument to deceive and conceal their immoral affair (which is an affront to the public's policy upholding the sanctity, serenity, and virtues of matrimony). Any room (however small) allowed to entertain the plaintiff's sham

claim or the defendant's sham defense, would only bring about further decay into the public's morality, decency, and integrity.

[77] Public policy dictates that this court shall not expend any time or resources to give any legal remedies onto parties who have come before this court with utter deception to conceal their immoral acts and engagements.

[78] Thus this court's decision, on the balance of probabilities, that the plaintiff's claim be dismissed.

[79] And considering the deceptive nature of both the plaintiff's claim and the defendant's defenses, all parties shall bear their own costs.

GROUNDS OF APPEAL

[11] In this appeal, the plaintiff raised four main issues as follows:

(a) defendant's submission of 'no case to answer';

(b) excess of jurisdiction in unilaterally arriving at a finding which purportedly was against public policy and morality, namely that the plaintiff and defendant were engaged in a secret affair;

(c) pleading requirements not adhered to by the defendant; and

(d) considering the issue of illegality on her own volition without giving parties the opportunity to submit on the same which led to the finding of the purported 'secret affair'.

[12] Having heard the plaintiff's submissions, the crux of the plaintiff's complaint is that notwithstanding the submission of 'no case to answer' by the defendant upon close of the plaintiff's case, the learned judge erred in law and/or in fact when she failed to consider the evidence adduced by the plaintiff to determine:

(a) whether the cause of action in defamation is made out; and

(b) if it is indeed made out, what is the quantum of general damages including aggravated damages which are payable in respect of the first impugned publication over StarTV.com and the second impugned publication on Facebook.

OUR ANALYSIS

[13] The learned judge in her grounds of judgment at para [21] acknowledged that at the end of the plaintiff's case, the defendant decided to offer a no case to answer and the defendant himself need not testify to answer to the plaintiff's testimony. The respondent in his submission also confirmed that he had submitted no case to answer after the plaintiff closed her case.

[14] From the judgment, we noted that the learned judge did not deal or attempt to deal from this point of view when the law is trite that when there is a submission on no case to answer, the defendant is accepting the plaintiff's evidence at its face value, no case has been established in law or that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged by the plaintiff.

[15] In *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037, the court only looks at the evidence led by the plaintiff and nothing else on submission of no case to answer. Hence, it remains for the court to investigate the plaintiff's case first in order to determine if he has proven his case when the defendant submits that he has no case to answer except that if the court finds that the plaintiff has succeeded in proving his case, judgment is to be pronounced in favor of the plaintiff.

[16] In *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 referred to in *Timbermine*'s case held that:

> [32] ... It must be understood that once a defendant elects not to call for evidence, apart from him being bound by that election, the effect is also that all the evidence led by plaintiff must be assumed to be true. This proposition of law was succinctly said in *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bt Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p 712:
>
> > For one a defendant in civil proceedings elects not to call evidence, the all the evidence led by the plaintiff must be assumed to be true.

[17] In the grounds of judgment by the learned judge, the trite principle applied by her in this case is as follows:

> [24] It is principle that this court cannot turn a blind eye to matters of illegality and matters which lead to the decay of public's morality and integrity (public policy considerations). Specially, in defamation cases, the court ought not consider or even entertain a plaintiff (worse still both parties) who had exhibited immoral and dishonorable conduct.
>
> [32] Thus this court shall not waste any time to entertain either the plaintiff's disingenuous cause of action in defamation, or the defendant's defenses against the plaintiff's claim. Instead, it is opportune here for this court to address at length, *the clear evidence of the plaintiff's and defendant's sordid extramarital affair* (which the parties knowingly attempted to conceal by abusing this court).
>
> [33] It is immensely pertinent to note that *both parties have admitted in evidence and heavily relied upon recorded telephone conversation transcriptions in proving their respective cases. And indeed, upon examination of the same transcripts both parties so heavily relied on, this court agrees that the transcripts are infinitely telling*, but not at all in the manners the parties initially intended. Instead, the transcripts, and SMS

conversations intimately shared between both parties reveal a whirlwind of extramarital passion. A

[18] It is very clear from the very beginning, the decision reached was purely on illegality and public morality arising from immoral mutual bond between the parties. The above finding was clearly reached based on evidence and admission by both parties. In other words, the learned judge has considered the evidence led by the defendant as well. Indeed, when the learned judge stated that both parties heavily relied upon recorded telephone conversation transcriptions in proving their respective cases, it must mean that the defendant had given evidence and proved his case by relying on recorded telephone conversation transcriptions. In other words, the telephone conversation transcription purportedly showing immoral conduct by both parties has been established. B C D

[19] In this case, the defendant offered no evidence at all during the trial. Most importantly, neither parties made any admission that they were involved in immoral conduct. The plaintiff only referred to the press statements issued by the defendant as the basis for her claim in defamation. It is the court's duty to examined the plaintiff's claim and the evidence led by her to determine in light of the defendant's offered no evidence whether, all the evidence led by the plaintiff must be assumed to be true or the plaintiff's evidence at its face value, no case has been established in law or that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged. If the plaintiff has succeeded in proving his case, judgment is to be pronounced in favor of the plaintiff. E F

[20] In our view, the learned judge has misdirected herself on the principle of law to be applied in this case especially where the evidence only came from the plaintiff. The finding therefore, cannot be based on evidence and admission by both parties. It is also incorrect to base the finding on both party's reliance upon recorded telephone conversation transcriptions in proving their respective cases when the defendant never offered any evidence and at the same time no evidence to show that the plaintiff relied on the recorded telephone conversation transcriptions to prove her case. We find that it is the defendant who stated in his witness statement about the recorded telephone conversation transcription which we believe may have prompted the learned judge to make a finding that both parties have admitted in evidence and heavily relied upon recorded telephone conversation transcriptions in proving their respective cases when in fact, the recorded telephone conversation transcription evidence was never proven or established. the learned judge, in our view has misdirected herself in examining the recorded telephone conversation transcriptions in arriving into her decision. G H I

A **[21]** In the present case the cause of action in defamation confines to the recorded press statements which have been published in the StarTV.com and on the defendant's Facebook page which the plaintiff claims are defamatory against her and untrue. The defendant in his defense admitted that the press statements were published and they were substantially true and justified. Indeed, the defendant pleaded the defense of justification to demolish the plaintiff's claim against him. However, defendant elected not to give evidence and made submission on no case to answer.

C **[22]** In our consideration, we find that the learned judge had failed to consider if the plaintiff had made out her cause of action in defamation in light of the submission of no case to answer by the defendant instead of making a finding that both parties had exhibited immoral and dishonorable conduct and dismissed the plaintiff's claim.

D **[23]** We find that the decision is clearly wrong and liable to be set aside. The decisions of the Federal Court in *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553 held that the decision of the court below will be reviewed if the findings were plainly E wrong or perverse.

[24] In this case, the full trial of the plaintiff's case had been completed. We rehear the plaintiff's case or claim under s 69(1) of the Courts of Judicature Act which states that the appeal shall by way of re-hearing. The Court of Appeal F may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

G **[25]** We considered the evidence by the plaintiff and the documentary evidence submitted during the trial to determine whether the plaintiff's claim has been made out. The plaintiff's cause of action is for defamation against the defendant in respect of press statements issued by the defendant and published in StarTV.com and on the defendant's Facebook page.

H **[26]** At the trial, the plaintiff called three witnesses in PWS1, PWS2 and PWS3 who gave evidence for the plaintiff. Their witnesses' statements are in the record of appeal and duly marked as exhibits. Strangely, the defendant's witnesses' statements are also found in the record of appeal but not marked as I exhibits presumably, they were not called by the defendant to give testimony therefore, in our view the defendant witnesses' statement cannot be admitted in evidence when the statements are not given under oath or subject to cross-examination by the plaintiff.

OUR DECISION

[27] In *Lim Guan Eng lwn Utusan Melayu (M) Bhd* [2013] 8 MLJ 575; [2012] 2 CLJ 619 it was clearly stated that in defamation cases the burden of proof initially would be upon the plaintiff to show that:

(a) the statements or words complained of were capable to have or had the tendency of bearing a defamatory meaning;

(b) the statements or words referred to the plaintiff; and

(c) the statements or words which formed the subject, or the action had indeed been published (ie, in its technical senses).

[28] It is also decided in *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152; [1989] 1 CLJ Rep 321 that only after the three elements required of the plaintiff had been satisfied, would the burden shift to the defendant, in the second stage of the enquiry that is, to prove on credible evidence the pleaded defense(s) of the defendant and/or that the alleged words or statement were not defamatory.

Publication

[29] It is not disputed that the recorded press statement was published or broadcast later the same day on 18 May 2019 by StarTV.com over the internet. The press statement was read out by the defendant during a press conference in the presence of members of the press and others whom he had invited. The defendant had also on 18 May 2019, after his press conference, uploaded or published a copy of his press statement in his Facebook page with a picture of him appearing in the top section of his Facebook page. We agree with the plaintiff that when the defendant called or arranged for the press conference and invited, inter alia, members of the press to be in attendance, he is deemed to have intended and caused the publication of the press statement on StarTV.com (see: *Hj Saari bin Sungib v Pemegang Amanah Lembaga Zakat Selangor (MAIS), Berdaftar & Anor* [2016] 2 MLJ 830; [2016] 5 CLJ 40).

[30] We are of the considered view that the element of publication has been proved. The press statements were indeed published by the defendant over StarTV.com on the internet (which is accessible by the public locally and abroad) and also posted on the defendant's Facebook page. Clearly therefore the words complained of were indeed published by the defendant respectively both on StarTV.com and Facebook.

Reference to plaintiff

[31] It is not disputed that the plaintiff's name is not mentioned in both impugned publications. Notwithstanding this, we find that the statements complained of referred to the plaintiff concerning her. Whether the words refer to the plaintiff is a question of law (see: *Atip bin Ali v Josephine Doris Nunis & Anor* [1987] 1 MLJ 82; [1986] CLJ Rep 283). According to *Duncan and Nell on Defamation* (3rd Ed), the learned authors say in para 7.03, p 62 that the test where the words complained of do not themselves clearly identify the claimant (as in the instant case) the matter can sometimes be decided by reference to their context and if the claimant can show that the words would have been understood to refer to him because of some facts or circumstances which are extrinsic to the words themselves. If these facts are proved, the question becomes: would reasonable people know these facts or some of them reasonably believe the words referred to the claimant? Further, the learned authors say that although the issue of identification is to be decided by an objective test whether reasonable people would reasonably understand the words to refer to the plaintiff, the plaintiff is entitled to call witnesses to prove that they understood the words to refer to him or her (see also: *Wong Yoke Kong & Ors v Azmi M Anshar & Ors* [2003] 4 MLJ 96; *Knupffer v London Express Newspaper Ltd* [1944] AC 116; *Gatley on Libel and Slander* (10th Ed)).

[32] Based on the test set out in the above authorities, the extrinsic facts referred to which connect the plaintiff to the words complained of have indeed been pleaded and particularised in para 9 of the statement of claim. The words complained of referred to or were understood to refer to the plaintiff are as set out in sub-paras 9(a) to (i) of the statement of claim, inter alia, that the defendant was the PKR Member of Parliament for Sungai Siput at the material time. The plaintiff was appointed as defendant's research officer for Parliament Sungai Siput and her application for a visitor's pass to *Bahagian Keselamatan Parlimen Malaysia* was signed and endorsed by the defendant. When the plaintiff resigned working with the defendant, the defendant then wrote a letter on 10 May 2019 to the *Bahagian Keselamatan Parlimen Malaysia* which had issued the security pass to the plaintiff earlier, to have the same cancelled. As the defendant's research officer for Parliament Sungai Siput, the plaintiff was known by many people whom she worked with and in any activities concerning her work while discharging her duties as research officer. The words complained of mentions that the person concerned is married with children and lives in Puchong. This facts were supported by PW2, the plaintiff husband. Hence, the words complained of although not naming the plaintiff, would clearly identify her as the person being referred to in the impugned publications or would be reasonably be understood to refer to her.

Defamatory

[33] Whether the words complained of are defamatory, one must consider not only the actual words used, but the context in which they were used. Words complained of will be defamatory if the words were calculated to expose the plaintiff to hatred, ridicule, or contempt in the mind of a reasonable man or they tend to lower him in the estimation of right-thinking members of society in general (see: *Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor* [2007] MLJU 894; [2008] 2 CLJ 814). The test of whether the words can convey a defamatory meaning is a question of law calling for a decision by the court (see: *Wong Yoke Kong & Ors v Azmi M Anshar & Ors* [2003] 4 MLJ 96).

[34] The plaintiff had given her evidence as found in witness statement. We examined her witness statement and evidence. She gave detailed explanations on why the press statements contain words which are defamatory to her. Her evidence supported her pleaded case of defamation against the defendant. It was in her evidence that the words complained of were not true and clearly uttered to paint her in bad light. The plaintiff also in her evidence denied that she made numerous unsolicited telephone calls to the defendant. She lodged a police report on 16 May 2019 regarding the defendant's behavior after resigning from her job with the defendant. The plaintiff's witness statement is marked as PWS3 at pp 200 to 245 in encl 4 — *rekod rayuan* Jld 2A.pdf. The plaintiff's evidence is supported by PWS1, the committee member of PKR Sungai Siput Branch and PWS2, the plaintiff's husband.

[35] Having considered the impugned publications as a whole in its context and the plaintiff's evidence, we are satisfied that the impugned publications in both StarTV.com over the internet and in the defendant's Facebook page certainly convey the natural and ordinary meanings or meanings the plaintiff claims it conveys as set out in para 10 of her statement of claim as follows:

(a) the plaintiff is malicious;

(b) the plaintiff is a liar and cannot be trusted;

(c) the plaintiff is unchaste;

(d) the plaintiff is flirtatious towards the defendant;

(e) the plaintiff interferes in the defendant's household matters;

(f) the plaintiff is a homewrecker;

(g) the plaintiff is disloyal to her husband;

(h) the plaintiff is unfit to be a mother to her children and wife to her husband;

(i) the plaintiff had attempted to seduce the defendant;

(j) despite being a married woman, the plaintiff had feelings for the defendant and/or was smitten by him;

(k) the plaintiff had issued unauthorised instructions on behalf of the defendant to government officers without his knowledge;

(l) the plaintiff was desperate to be the defendant's aide and would do anything to attain the same;

(m) the plaintiff had harassed the defendant with an unreasonable number of phone calls;

(n) the plaintiff had unreasonably harassed Rafizi Ramli about the defendant distancing from her;

(o) the plaintiff was persistent in her attempts at harassing the defendant with the sole aim of wanting to break-up his marriage; and

(p) the plaintiff was persistent in her attempts at harassing the defendant and even continued making numerous unsolicited phone calls to him up until May 2019.

[36] We agree with the plaintiff that when the same is read in its context, and amounts to nothing but a vicious attack on the plaintiff and thereby tarnishing her reputation. The gist or sting of the words complained of as contended by the plaintiff is that the plaintiff:

(a) goes around pretending that she is the defendant's Parliamentary Research Office when she is actually not;

(b) is a person with a malicious disposition?

(c) deliberately offered to assist the plaintiff in Sungai Siput even though she is married with two children and living miles away in Puchong, Kuala Lumpur, and therefore having an ulterior motive;

(d) had invited the defendant and his wife to join the plaintiff on her solo holiday to Melaka in which she was travelling alone, and once again had an ulterior motive;

(e) was constantly telephoning the plaintiff for no real reason and had interfered in the defendant's family affairs, was set in destroying the defendant's marriage, had shown an interest, and had feelings towards the defendant who is married, had made numerous phone calls to governments officers without the defendant's knowledge and issued instructions on behalf of the defendant without his approval;

(f) had demanded that she be given the Parliament security pass and used that to show that she had been appointed as the defendant's assistant; and

(g) had harassed Rafizi Ramli, PKR Vice President to complain about the defendant without any justifiable reason, namely that the defendant was distancing himself from her.

[37] We are satisfied that the words complained of are therefore certainly capable of defamatory meaning(s) as per their natural and ordinary meanings as demonstrated by the plaintiff and set out in statement of claim. These words would certainly bring the plaintiff into hatred, ridicule, and contempt in the mind of a reasonable person, or they tend to lower her in the estimation of right-thinking members of society in general. Under the circumstances in which they were published, a reasonable person would certainly understand them to be published in a defamatory sense and which points to the plaintiff as the person defamed.

[38] The plaintiff's evidence stands unrebutted by the defendant on account of his submission of no case to answer. Despite the fact the defendant did not call any witness, we are satisfied that the evidence adduced by the plaintiff must be assumed to be true and sufficient to prove her claim for defamation. On the factual matrix of the case, it is patently clear that the plaintiff has discharged the burden, and the burden is shifted to the defendant. the learned judge therefore fell into error when she failed to decide the case in favor of the plaintiff. Instead, digressed into another issue not canvassed by either party.

[39] We are unanimous in our decision that all three elements necessary to establish the cause of action in defamation have been satisfied, the plaintiff's claim must therefore be allowed with costs.

Damages

[40] We agree with the plaintiff that where a plaintiff has been defamed, he is not required to prove actual damage for the law presumes that some damages will result. Damages are awarded on a compensatory basis (see: *Evans On Defamation in Singapore and Malaysia* (3rd Ed) by Doris Cheah and Rueben Mathiavaranam p 187).

[41] The plaintiff has prayed for general damages (including aggravated damages) under para 17 of her prayers in her statement of claim.

[42] The plaintiff must be compensated, and the next question is how much would be the quantum of damages for her loss of reputation. In *Kesatuan Kebangsaan Pekerja-Pekerja Bank & Ors v The New Straits Times Press (M) Bhd & Ors and another suit* [2013] 8 MLJ 199, it was held that the tort of libel has been recognised as actionable per se. Thus, where a personal plaintiff proves publication of a false statement damaging to his reputation without lawful

justification, he need not plead or prove special damage to succeed (see also *Cheong Chark v Gammon (Malaya) Ltd* [1939] 1 MLJ 65).

[43] In determining quantum of damages, we have considered the following factors stated in the cases of *Dato' Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin* [2011] 8 MLJ 608 at p 621, I and *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807:

(a) the conduct of the plaintiff;

(b) the plaintiff's position and standing in society;

(c) the nature of libel;

(d) mode and extent of publication;

(e) the absence or refusal of retraction or apology; and

(f) the whole conduct of the defendant from the time the libel was published down to the very moment of the verdict.

[44] As for the gravity of the allegations, the plaintiff submitted that the allegations made by the defendant are indeed very grave or serious based on the sting of the words complained of. The defamation closely touches on the plaintiff's personal integrity, reputation, and honor, and the core attributes of her personality. The impugned publications were published twice respectively over the internet on StarTV.com and Facebook. Hence, the size and influence of the circulation are massive and untold. Seeing as how the impugned publications were from the defendant who is an MP, in so far as the effect of the publications are concerned, the words complained of would appear to 'carry far more weight' than one coming from an ordinary person.

[45] The aggravating factors which would go towards increasing the general damages claimed, the plaintiff pleaded in para 16 of the statement of claim as follows:

> 16. The plaintiff will rely on the following facts and matters in support of a claim for an injunction and aggravated and exemplary damages:
>
> (a) The defendant has failed to make any apology and withdrawal, or retraction of the said words complained of under paragraph 5 above despite the pre-action letter issued on behalf of the plaintiff;
>
> (b) The defendant knew or ought to have known that the allegations comprising the said words complained of under paragraph 5 above are untrue and/or false;
>
> (c) The defendant published the said words complained of under paragraph 5 above in the knowledge that they were defamatory and/or with a reckless disregard as to whether they were defamatory; and

(d) Despite the gravity of the defendant's allegations comprising the said words complained of under paragraph 5 above, the defendant proceeded to publish the same without making any prior attempt to verify the facts with the plaintiff or afford her any opportunity to comment on the proposed publication.

[46] The plaintiff submitted that in *Jahara Hamid lwn Lim Guan Eng* [2015] MLJU 2358; [2015] 6 CLJ 328, the High Court awarded RM500,000 as general damages including aggravated damages as well as an injunction and costs of RM40,000 for a publication appearing in the *Malay Mail* online in which the defendant, the then Chief Minister of Penang and a State Assemblyman had called the plaintiff, also a State Assemblywoman a 'racist grandmother'. In the case of *Tan Sri Dato' Lim Guan Teik v Tan Kai Hee* [2014] 9 MLJ 363; [2013] 10 CLJ 771, the High Court awarded the plaintiff a sum of RM200,000 as general damages including aggravated damages plus costs of RM100,000 in respect of two publications appearing in *Nanyang* and *Sin Chew* newspapers because of a press conference given by the defendant. In the case of *Kumarasamy a/l Naciappan v The New Straits Times Press (M) Bhd* [2013] 7 MLJ 361; [2012] 1 LNS 997, the plaintiff was awarded general damages of RM120,000 in respect of a publication in the New Straits Times newspaper of a wrong photograph of another person which was attributed to the plaintiff, and thereby suggesting that he had abandoned his political party members and finally in *Dato' Ahmad Sudin v Data' Ariffin Man* [2016] 1 LNS 136, the plaintiff, a Kedah State Assemblyman had sued the defendant, a Barisan Nasional Works Secretary for Kedah for damages for defamation in respect of a political speech given by him at a gathering. The High Court awarded the plaintiff RM100,000 as general damages and RM50,000 as aggravated damages and thereby a total sum of RM150,000.

[47] Based on the above authorities above, the plaintiff submitted that the damages range from RM500,000 to RM100,000 for general damages and about RM50,000 for aggravated damages. In this case, the plaintiff suggested the sum of RM200,000 for publication over StarTV.com on the internet plus aggravated damages of RM50,000 and RM200,000 for publication published on Facebook plus aggravated damages of RM50,000.

[48] In *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807, it was held that a particular libel case cannot be equated with other libel cases. Each libel case is unique and has its own particular and peculiar facts. In *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492 the court awarded the sum of RM100,000. In *Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal & Ors* [2009] 7 MLJ 371; [2009] 2 CLJ 682 the court awarded the sum of RM50,000. In *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor* [2012] 7 MLJ 301;

A [2011] 1 LNS 1161 the court awarded the sum of RM60,000.

[49] Based on the authorities cited above and in the circumstances of this case we allow the general and aggravated damages in the global sum of RM80,000 to the plaintiff. It is this court opinion that the amount awarded to
B the plaintiff is fair and reasonable.

CONCLUSION

[50] In the premises, the plaintiff claims is allowed against the defendant as
C follows:

(a) general and aggravated damages in the global sum of RM80,000;

(b) interests of 5% from date of judgment to the date of payment; and

D (c) cost of RM20,000 subject to allocator.

[51] Having found the learned judge decision is erroneous in the first instance and allowed the appeal by way of re-hearing, in our view it is not necessary for the other issues raised by the plaintiff to be determined.

E

Appeal allowed and appellant awarded global sum of RM80,000 in general and aggravated damages with interest and costs.

Reported by Ashok Kumar

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